

Supreme Court, U. S.
FILED

SEP 23 1977

UNITED STATES SUPREME COURT
October Term

No. **77-460**

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OHIO

MIGUEL A. GARGALLO, Petitioner

v.

TECLA GARGALLO, Respondent.

MIGUEL A. GARGALLO
Post Office Box 81
Columbus, Ohio 43216

Petitioner, Pro Se.

September ____, 1977.

UNITED STATES SUPREME COURT
October Term

No.

MIGUEL A. GARGALLO, Petitioner,
v.
TECLA GARGALLO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OHIO

The petitioner Miguel A. Gargallo respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in this proceeding on April 29, 1977.

OPINIONS BELOW

The judgment of the Supreme Court of Ohio, no opinion having been rendered, and the judgments and opinions of the Franklin County Court of Appeals and Franklin County Common Pleas Court, Division of Domestic Relations, not reported, as of to date, appear in the Appendix hereto.

JURISDICTION

On December 7 and December 9, 1976, the appellate court, entered its decision and judgment, respectively, dismissing the petitioner's appeal from the Common Pleas Court.

Thereafter, on April 29, 1977, the Supreme Court of Ohio, dismissed sua sponte the appeal from the Court of Appeals.

Mr. Justice Stewart signed an order, on July 19, 1977, extending the time for filing this petition for certiorari to and including September 26, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether the state courts of the State of Ohio, in a divorce case, commenced in 1968, may still by 1976, i.e. eight years later, keep the case pending by "leaving the ultimate issues to be still determined."

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment

"No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was commenced on June 26, 1968, in the Court of Common Pleas of Franklin County, Ohio, Division of Domestic Relations, under Case No. 136,865, the petitioner herein being the defendant.

By 1976, several orders had been entered, but the case had not been completed, although no stay of proceedings had ever been granted. Then on July 29, 1976, the petitioner moved the Common Pleas Court for an order dismissing the divorce action for want of prosecution. This motion was overruled by entry of August 6, 1976. (A.1).

On appeal from this entry, the Court of Appeals dismissed the appeal. The decision, rendered on December 7, 1976, states "that the order of August 6, 1976, ... does not constitute a final order

... but is procedural in character leaving the ultimate issues to be still determined." (A.3). The judgment entered on December 9, 1976, dismissed the appeal "for want of jurisdiction." (A.5).

On appeal from this judgment, the Ohio Supreme Court, on April 29, 1977, dismissed the appeal sua sponte, stating that "no substantial constitutional question exists herein." (A.6).

The petitioner now invokes the jurisdiction of this Court to issue a writ of certiorari to review and reverse the judgments below.

REASONS FOR GRANTING THE WRIT

The decisions below are not in accord with applicable decisions of this Court, nor with the provisions of the Eighth and Fourteenth Amendments.

In the case of Ackerman v. United States, 340 U.S. 193, 198, this Court said:

"There must be an end to litigation someday."
(Emphasis added.)

The State court, by keeping this case pending ad infinitum, no stay having ever been granted, violates the "(no)...unusual punishments" and the "due process of law" clauses of the Constitution.

The basis concept of the Eighth Amendment to the Constitution, is that it guarantees to any person the principle of civilized treatment.

The "due process of law" clause is invoked in pari materia with Section 16, Article I, of Ohio Constitution, which guarantees that "every person ... shall have justice administered without denial or delay."

THE COURTS BELOW ERRED AND RAISED SIGNIFICANT PROBLEMS

The courts below erred because they violated the Eighth and Fourteenth Amendments.

If the State courts are permitted to follow the procedure they have established with the peti-
tio-

ner, there would not be possible to have justice administered.

CONCLUSION

For these reasons, a writ of certiorari should issue to review and reverse the judgments of the courts below.

Respectfully submitted,

MIGUEL A. GARGALLO
Petitioner, Pro Se
P.O. Box 81
Columbus, Ohio 43216
(614) 421-6940 (Ext. 2098)

UNITED STATES SUPREME COURT October Term

No.

MIGUEL A. GARGALLO, Petitioner,
v.
TECLA GARGALLO, Respondent.

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A.1

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985

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

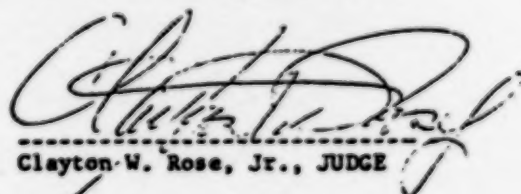
DIVISION OF DOMESTIC RELATIONS

Tecla Gargallo,)	Filed: Aug. 6, 1976
Plaintiff,)	
-vs-)	No. 136,865
Miguel A. Gargallo,)	
Defendant.)	

E.N.T.B.Y

This day this cause came on to be heard on the motion of the defendant. The Court, being fully advised in the matter, after considering the motion and memorandum of the defendant, finds that the motion is not well taken and overrules the same.

This case has been diligently prosecuted; the case was completed and a judgment entry of divorce was entered after a previous appeal had been taken to a previous judgment entry of divorce; an appeal was also perfected from the later judgment entry of divorce and the Court was affirmed; subsequent to that a nunc pro tunc entry was erroneously entered by this Court in an attempt to correct and spell out the legal description of the real estate; and an appeal was taken from that entry and this Court was reversed. Pursuant to the mandate of that appellate decision an entry was filed vacating the nunc pro tunc entry which leaves in effect the previous judgment entry of divorce.



Clayton W. Rose, Jr., JUDGE

cc: Tecla Gargallo Beck
Plaintiff

Miguel A. Gargallo
Defendant

Paul A. Scott

A.2

IN THE COURT OF APPEALS OF THE TENTH APPELLATE JUDICIAL DISTRICT OF OHIO

TECLA GARGALLO, PLAINTIFF-APPELLEE, v. MIGUEL
A. GARGALLO, DEFENDANT-APPELLANT.

M E M O R A N D U M O P I N I O N

(CASE #76AP-777 - Decided December 7, 1976

APPEAL: Court of Appeals for Franklin County.

MESSRS. TYACK, SCOTT & COLLEY, Mr. Paul A.
Scott, of counsel for Plaintiff-Appellee.

MR. MIGUEL A. GARGALLO, In Propria Persona,
Defendant-Appellant.

PER CURIAM: This appeal comes before us sua sponte for consideration of the jurisdiction of this court to hear and determine this appeal. Notice of appeal was filed in the trial court on September 7, 1976, and designated the orders appealed from as follows:

1. From the entry entered on August 6, 1976, and
2. "From all the decrees, judgments and orders, prejudicial to the defendant entered in this action since its commencement and until August 6, 1976."

The second item does not enter timely appeal from any order since the last order prior to August 6, 1976, was an entry journalized on November 20, 1975. No notice of appeal filed after the 30-day period provided for in Appellate Rule 4(A) can be effective to confer jurisdiction upon this court and no motion for new trial or motion under Appellate Rule 50(B) extended that time. Therefore under paragraph 2 of the notice of appeal, appeal is not timely taken from any order prior to August 6, 1976.

The first item appeals from an order of August 6, 1976. This order, which overruled a motion to dismiss for want of prosecution filed July 29, 1976, was entered on the journal of the trial court on August 6, 1976. The period of thirty days expired on September 5, 1976, which, however, was a Sunday, and the last day for filing a notice of appeal became, under App. Rule 14, Monday, September 6, 1976, which was Labor Day. The motion, therefore, was under the Rule timely filed on Tuesday, September 7, 1976.

Looking, however, to the content of that order of August 6, 1976, it is clear that it does not constitute a final order. The overruling of a motion to dismiss for want of prosecution is purely interlocutory. It does not effectively and finally determine any rights of the parties but is procedural in character leaving the ultimate issues to be still determined. *Hymel v. Bing*, 67 Ohio App. 432; *Sellman v.*

Schaaf, 17 Ohio App. 2d, 69.

Therefore, there being no timely appeal from any final order, this court has no jurisdiction to proceed. The appeal is dismissed at the costs of the appellant and this cause is remanded to the trial court.

The appeal being dismissed the motions filed by appellant herein are moot.

Appeal dismissed.

COLE, P.J., MILLER and GUERNSEY, JJ, concur.

COLE, P.J., MILLER and GUERNSEY, JJ, of the Third Appellate Judicial District, sitting by assignment in the Tenth Appellate Judicial District.

A.5

IN THE COURT OF APPEALS OF THE TENTH APPELLATE JUDICIAL DISTRICT OF OHIO
32-32

FRANKLIN COUNTY

TECLA GARGALLO,
PLAINTIFF-APPELLEE,
v.
MIGUEL A. GARGALLO,
DEFENDANT-APPELLANT.

CASE NO 176AP-777

JOURNAL
ENTRY

Filed: Dec. 9, 1976

This matter comes before the court sua sponte upon the notice of appeal and the record. The court finds that the order of August 6, 1976, from which appeal is taken does not constitute a final appealable order or judgment, and that as to all other orders and judgments this appeal is not timely filed; that by reasons thereof this court has no jurisdiction to proceed with this appeal.

Wherefore, it is ORDERED, ADJUDGED and DECREED that this appeal be, and the same hereby is, dismissed for want of jurisdiction at the costs of the appellant and that this cause be, and the same hereby is, remanded to the Common Pleas Court of Franklin County, for execution and further proceedings in accordance with law.

Exceptions saved.

[Signatures]
JUDGES

COLE, P.J., MILLER and GUERREY, JJ. of the Third Appellate Judicial District, sitting by assignment in the Tenth Appellate Judicial District.

A.6

SC-10A

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19..17. TERM

To wit: April 29, 1977

Tecla Gargallo,
Appellee,
vs.
Miguel A. Gargallo,
Appellant.

No. 77-146

APPEAL FROM THE COURT OF
APPEALS

for FRANKLIN County

This cause, here on appeal as of right from the Court of Appeals for.....
Franklin.....County, was heard in the manner prescribed by law, and,
no motion to dismiss such appeal having been filed, the Court sua sponte dismisses
the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to
the Clerk of the Court of Appeals for.....Franklin.....County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the
foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this.....day of..... 19.....

Clerk

Deputy